# A NEW COMMITMENT

**STATEMENT**
**OF THE**
**CANADIAN HUMAN RIGHTS COMMISSION**
**ON**
**FEDERAL ABORIGINAL POLICY**

**November 21, 1990**

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On request, this statement will be made available on audio-tape and in large print.

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## INTRODUCTION

When the confrontation at Kanesatake and Kahnawake, Oka and the Mercier Bridge came to an end, members of the Canadian Human Rights Commission shared in the relief felt by all Canadians. It is now time to begin removing other, more formidable barriers that have long prevented aboriginal Canadians from assuming their rightful place in Canadian society.

It is deeply regrettable that it has taken conflict and violence to bring about a realisation of the urgency of reform in aboriginal affairs. We believe that aboriginal and non-aboriginal Canadians alike see the present juncture as an opportunity to apply ourselves to the long-neglected national task of redesigning the aboriginal and non-aboriginal relationship in a spirit of collaboration and good faith. This process should get under way immediately and should tackle the fundamental questions in a thorough and innovative way.

### A NEW COMMITMENT

The federal government's stated commitment to move toward fundamental reforms is welcome. In the coming months the Commission looks forward to seeing details of the government's plans to help resolve the many problems facing the aboriginal peoples.

There is no doubt that progress has been made by aboriginal peoples in the last twenty-five years. In the same period, aboriginal Canadians have made important advances towards autonomy, self-reliance and cultural renewal. Those gains have not, however, been sufficient either to keep pace with the legitimate expectations of native peoples or with Canada's international and national obligations.

Aboriginal Canadians are more than ever aware of how much further they have to go to achieve equality. For every community where headway has been made on land claims, self-government or economic development, there are dozens of others with grievances still outstanding and aspirations still to be realized. The pace of change is simply too slow.

Even a cursory review of the history of native-government relations makes it clear that aboriginal affairs have not been treated with the priority they deserve by the federal and provincial governments.

- Despite a long-standing claims policy, only three comprehensive claims have actually been settled.
- Hundreds of specific claims have been filed; fewer than fifty have been settled to the satisfaction of the aboriginal communities involved.
- A self-government policy in effect for four and a half years has so far produced meagre results.

- o On-reserve housing programs have difficulty keeping pace with population growth, let alone dealing with the backlog of housing needs.

- o Despite changes to the Indian Act in 1985 to remove sexual discrimination (Bill C-31), the government has not provided adequate resources to reintegrate band members.

- o As recently as last winter, the government made major cuts in vital aboriginal communications and language programs.

And what of the Métis, non-status, off-reserve status and some Inuit communities that do not even fit within the limited policy and program structures established by the Department of Indian Affairs? The fact is that the so called federal "aboriginal policy" deals almost exclusively with on-reserve status Indians. Yet the living conditions of many off-reserve aboriginal peoples, especially in our major urban centres, are at least as bad as those facing many reserve communities.

## A COMMISSION ON ABORIGINAL AFFAIRS

For the last two years the Commission has been advocating a commission of inquiry as one way to achieve the more general consensus needed to forge a new association between aboriginal and non-aboriginal Canadians.

The focus of a commission of inquiry would be on the broad conceptual issues affecting self-government, aboriginal justice systems, economic development and treaty and aboriginal rights. Questions about the appropriate scope of treaty promises in modern society or the jurisdiction of a parallel justice system need to be examined closely. As well, there is a pressing need to explore a variety of questions relating to aboriginal self-government, for example, the meaning of the term to various aboriginal groups, different models that may be appropriate to different communities, and the situation of non-aboriginal peoples within areas subject to aboriginal authority. These are not issues which offer ready-made solutions; nor should their exploration impede current policy reforms which are so urgently required. The commission could undertake the careful conceptual review which would enable informed Canadians to come to grips with the rights of aboriginal peoples in modern Canada.

Recently the Prime Minister announced the establishment of the Constitutional Forum to look into the future of the federation. While aboriginal matters are one of the many issues that the Forum will consider, its broad mandate makes it very unlikely that it will be able to give these questions the kind of comprehensive attention that is so urgently required. There need be no conflict between the work of the Constitutional Forum and that of a commission of

inquiry on aboriginal affairs. Canada cannot afford to wait until other outstanding problems of concern to the federation have been canvassed at length before coming to grips with the immediate political and practical concerns of the aboriginal peoples.

> **The Commission therefore strongly reiterates its recommendation that a commission of inquiry on aboriginal affairs be established at the earliest possible date.**

## THE NEED FOR A NEW ABORIGINAL-GOVERNMENT FORUM

It is manifest that the confrontational situations of recent months reflect a breakdown of established mechanisms of political dialogue between Native and non-Native Canadians. At present, there is simply no adequate means whereby aboriginal people can meet with government and work out the issues that separate them. It must now be clear that only an extended encounter at the most senior levels will suffice to define the processes that will be needed. The Conferences of First Ministers on Aboriginal Constitutional Affairs, in which representatives of the aboriginal peoples were full participants, did provide such a mechanism for working out aboriginal concerns. Aboriginal leaders are entitled to a continuing forum in which they can discuss their concerns directly with government leaders who have the authority to make decisions concerning our future together.

> **The Commission recommends that the Prime Minister convene a meeting with representatives of the aboriginal peoples to discuss how to create such a forum.**

## THE ISSUES

A comprehensive analysis of the main issues facing aboriginal peoples is beyond the scope of this report. They are complex and will not be easily resolved. That is one reason why the Commission has urged the formation of a Royal Commission that will have the resources and expertise to give them the attention they require. We have, however, given some thought to these issues and believe it may be helpful at this juncture to present our views on some of the key questions.

Three issues are fundamental to establishing a new Indian-government relationship: land claims, self-government, and economic self-sufficiency. They are interdependent and must, if they are to be effectively dealt with, be embedded in a comprehensive policy.

## ABORIGINAL CLAIMS

Aboriginal and treaty rights have legal force, as has been repeatedly recognized and affirmed by the Courts and, more recently, by the Canadian Constitution. No one can turn back the clock to a time before the settlers occupied this land. But Canada,

as a democratic society founded on respect for human rights, can and must achieve a just and lasting settlement with aboriginal peoples. Land claims and land rights must form an integral part of any such settlement.

Under the Constitution the federal government bears a special responsibility for "Indians, and Lands reserved for the Indians" ; and in the 1982 amendments to the Constitution a specific guarantee of "existing aboriginal and treaty rights" was entrenched. On May 31, 1990, in Sparrow v. The Queen, the Supreme Court of Canada interpreted the latter section of the Constitution to mean that the federal government has a duty to uphold the honour of the Crown and give effect to the promises made long ago. The Court also ruled that the government had to protect aboriginal rights to the extent possible in the modern context, and to develop a relationship of trust with aboriginal peoples.

It is the Commission's view that the current claims policy is not consistent with these obligations. It is both out-dated and based on questionable assumptions about the scope of aboriginal rights as they relate to land use and occupancy. Land claims are an integral part of a "just and lasting settlement" with the rest of Canadian society, and must be understood and appreciated as such by non-aboriginal Canadians.

Perhaps the most fundamental problem facing aboriginal peoples in respect of land claims today is the lack of a proper forum in which to address all of their concerns. The current land claims policy is set out by the federal government in several statements. These deal with land claims in a piecemeal way and do not even have the force of law, let alone constitutional status.

Moreover, the process is heavily weighted in favour of the government. A claim may be rejected solely on the legal advice of the Department of Justice and without any opportunity for aboriginal people to test the validity of that advice. This is a clear conflict of interest. The courts have determined that the Crown has a responsibility to work in the best interests of aboriginal people. How can this possibly be squared with a system which also requires the Crown to determine the validity of a claim?

**The Commission therefore recommends that consideration be given to establishing a third body, for example, an independent Claims Commission, to put an end to this untenable position.**

A particularly troubling aspect of the current policy is the requirement that claimants relinquish their aboriginal rights and title in return for the benefits provided in an agreement. In light of the Sparrow decision, such a requirement must be seriously questioned. Certainty of land title in an area under claim is of course a reasonable government expectation, but there should be a way short of extinguishment by which that this can be assured.

**The Commission therefore recommends that land claims policy recognize that instead of extinguishing aboriginal rights, land claims agreements must confirm and clarify these rights.**

The Prime Minister's announcement that the government would no longer limit comprehensive claims negotiations to six claims at any one time, that specific claims negotiations would be accelerated, and that treaty land entitlements would be honoured are all important steps in reforming the claims process. But if claims are to be adequately resolved, a much more fundamental reexamination of claims policy is required, as is a substantial commitment of new funds.

Also required is a commitment by the provincial governments involved in claims negotiations to adopt policies which clearly recognize the legitimacy of aboriginal rights and commit their governments to the speedy resolution of aboriginal claims. Recent initiatives give some cause for hope that provincial authorities are moving in this direction.

## SELF-GOVERNMENT

For aboriginal people in Canada, a measure of control over their own affairs is fundamental to their well being. Existing policy on self-government is deficient in several respects, but particularly in failing to recognize the inherent nature of this claim. The current practice of decoupling land claims and self-government negotiations overlooks their interdependence, while the community-based approach to self-government is at best a stop-gap approach with no constitutional counterpart.

There is no lack of recognition in public and parliamentary reports of the past decade that self-government for Canada's first nations is urgently required. And as far back as April 1986, the Minister of Indian Affairs proclaimed that self-government was "a major theme and priority" of his department. The 1987 First Ministers Conference failed to reach agreement on the entrenchment of aboriginal self-government in the Constitution - mainly because some provincial governments were reluctant to do so without knowing the full scope of "self-government".

The actual outcome of the government's approach to self-government is far from encouraging. On the constitutional front there have been no negotiations, let alone progress, since 1987. The difficulties in entrenching self-government in the Constitution are formidable, especially in light of recent constitutional developments; but constitutional recognition is essential to the success of any long-term policy on self-government.

Even if much remains to be fleshed out, aboriginal self-government is not an alien concept for Canadians. Before the adoption of legislation like the first Indian Act in 1876, native peoples enjoyed substantial autonomy within the lands they occupied, living under traditional governments with jurisdiction over social, economic and political matters.

Admittedly, there is no clear and common definition of the contemporary meaning of self-government among the aboriginal peoples. They are not homogenous and cannot be expected to be so. A workable self-government system for one community might be unacceptable to another. The objective must be to design systems that are suited to the particular needs of communities or groups of communities. They may include control over a variety of matters: band-membership, education, social welfare, economic development, housing and infrastructure, resource and wildlife management, local taxation, certain aspects of the administration of justice and policing, and a host of others.

Many Indian communities - and most political organizations - have expressed the desire to move away from the Indian Act regime and out from under the tutelage of the Department of Indian Affairs bureaucracy. The Indian Act is fundamentally and irreparably flawed. No amount of tinkering can alter that, and the long range objective must be to remove from the laws of Canada a statute which, as the Prime Minister has himself said, diminishes all Canadians by its very existence.

**The Commission recommends that the Canadian government commit itself to the early replacement of the outdated and paternalistic Indian Act regime by appropriate constitutional and legislative action that recognizes the unique status of the aboriginal peoples.**

The government should also give serious consideration to replacing the Department of Indian Affairs with an agency more in keeping with the realities of modern Canada. The Department has made some quite remarkable changes in recent years, for which it deserves credit. Indian communities now manage the great majority of program funds and there are far fewer bureaucrats looking over their shoulders. The fact remains that the Department, like the legislation it administers, is a relic of a past that must be put behind us.

**The Commission therefore recommends that serious consideration be given to replacing the Department of Indian Affairs with a new agency for aboriginal-federal relations.**

## ECONOMIC SELF-SUFFICIENCY

Under the 1976 International Covenant on Economic, Social and Cultural Rights, Canada committed itself to guarantee the rights of everyone "to an adequate standard of living for himself and his family, including adequate food, clothing and housing", and "to the enjoyment of the highest attainable standard of physical and mental health".

The sorry list of statistics on the socio-economic plight of aboriginal people in Canada has of late received considerable attention. Aboriginal people have not shared in Canada's enviable progress in wealth and well-being. Instead, they have remained what many

observers have called our "Third World". The condition of Indians, Inuit and Métis in this country, despite recent strides in health, housing and education standards, is still deplorable. Without specific policy action to combat poverty, ill health and illiteracy, both on- and off-reserve, Canada will remain seriously wanting in its legal and moral obligations toward aboriginal people.

Under the Indian Act, a "reserve" is "a tract of land the legal title to which is vested in Her Majesty, and that has been set apart by Her Majesty for the use and benefit of a band". Despite the central importance of land to aboriginal economies, their land is therefore deemed the property of the federal government, subject only to "use" by aboriginal people, and vulnerable to incursions of all kinds. The land base of many native bands has been substantially reduced over time through expropriations for railways, roads, hydroelectric projects and military bases, and governments have been more ready to acquire land for national parks and civic projects than for aboriginal people. Improved living conditions are an obvious prerequisite for long-term self-reliance. Children living in sub-standard housing and often attending schools which would be condemned in other communities can hardly be expected to grow-up to be self-confident entrepreneurs and professionals.

**The Commission recommends that the government vigorously pursue the goal of ensuring that the fundamental needs of all reserve communities are met within this decade.**

Aboriginal peoples living off-reserve remain the majority. In many of our urban centres, particularly in the West, aboriginal people are becoming a seemingly permanent urban "underclass". To date no government has developed a policy that even begins to deal with this phenomenon.

**The Commission recommends that a policy be enunciated that clearly incorporates the special needs of urban aboriginal people.**

## CONCLUSION

The interrelation of land claims, self-government and economic self-sufficiency is the key to understanding the aboriginal situation. The inherent difficulties of balancing traditional and modern economics are clearly exacerbated by an insufficient land base, unclear title and the absence of ultimate or effective control. The operation of the Indian Act and of many governmental policies in respect of economic activities on reserves perpetuates an artificial and antiquated dependency at the same time as it purports to offer new avenues towards self-sufficiency and self-government.

It would be naive to believe that all the problems of the aboriginal people would be solved if only governments made a true commitment to mend their ways. Government commitment is essential, but the problems faced by aboriginal communities are deep rooted and complex, and will also entail action by the communities themselves. Time, patience, and considerable commitment of human and fiscal resources, will be required on all sides. The task is not beyond the capabilities of a country such as Canada, and it must remain a fundamental component of our commitment to human rights and fairness to all peoples.